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SUPREME COURT OF THE UNITED STATES.

No. 29.

JOHN McNIEL, PLAINTIFF IN ERROR,

VERSUS

LOWEL HOLBROOK.

ERROR TO THE CIRCUIT COURT UNITED STATES FOR THE DISTRICT OF GEORGIA.

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UNITED STATES, *District of Georgia:* In the 6th circuit court U. S.

Be it remembered that in the term of November, in the year of our Lord one thousand eight hundred and thirty-six, at Milledgeville, in the district aforesaid, came Lowel Holbrook, by W. W. Gordon his attorney, into the said court, and impleaded John McNiel in a certain plea of assumpsit, on which the said Lowel declared against him, that whereas, on the first day of September, eighteen hundred and thirty-three, at Savannah, in said district, the said John made and signed his certain promissory note in writing, bearing date the day and year aforesaid, and thereby promised to pay, twenty-four months after date, to the order of one William P. Wilson, the sum of fifteen hundred dollars for value received, and then and there delivered sai note to the said William P., and the said William P. then and there endorsed and delivered the said note to your petitioner, whereby the said John became liable; and being so liable, in consideration thereof, the said John afterwards, to wit, on the day and year aforesaid, in said district, undertook and promised your petitioner to pay him said sum of money, in said note specified, according to the tenor and effect thereof. And whereas, also, afterwards, to wit, on the day and year aforesaid, at Savannah, in said district, the said John made and signed other his said promissory note in writing, bearing date the day and year aforesaid, and thereby promised to pay, eighteen months after date, to the order of the said William P. Wilson, other the sum of fifteen hundred dollars for value received, and then and there delivered said note to the said William P., and the said William P. then and there endorsed and delivered said note to your petitioner, whereby the said John became liable; and being so liable, in consideration thereof, the said John afterwards, to wit, on the day and year aforesaid, in said district, undertook and promised your petitioner to pay said sum of money in said note specified, according to the tenor and effect thereof. And whereas, also, afterwards, to wit, on the first day of October, in the year aforesaid, at New York, to wit, in said district, the said John made and signed other his certain promissory note in writing, bearing date the day and year aforesaid, and thereby promised to pay, fifteen months after date, at the Bank of the State of Georgia, at Savannah, to the order of certain persons using the name and style of Smith, Booth, & Ufford, and the said Smith, Booth, & Ufford, being copartners in trade, then and there endorsed and delivered said note to your petitioner, whereby the said John became liable; and being so liable, in consideration thereof, the said John afterwards, to wit, on the day and year aforesaid, to wit, in said district, undertook and promised your petitioner to pay him the said sum of money in said note specified, according to the tenor and effect thereof. And whereas, also, afterwards, to wit, on the tenth day of November, eighteen hundred and thirty-four, at New York, to wit, in said district, the said John made and signed other his certain promissory note in writing, bearing date the day and year last aforesaid, and thereby promised to pay at the United States Branch Bank, Savannah, to the order of your petitioner, by the name and description of L. Holbrook,

assignee, ninety days after date, other the sum of eight hundred and eleven dollars twenty cents, for value received, and then and there delivered the said note to your petitioner, whereby the said John became liable; and being so liable, in consideration thereof, the said John afterwards, to wit, on the day and year last aforesaid, to wit, in said district, undertook and promised your petitioner to pay said sum of money in said last mentioned note specified, according to the tenor and effect thereof. Yet, though often requested, and although the two last mentioned notes were duly presented at the places where made payable, on the days when respectively due and payable, the said John hath not paid the same, but so to do hath refused, and still refuses, to the damage of your petitioner ten thousand dollars. And your petitioner avers that he your petitioner is a citizen of the State of New York, and that the said John McNiel is an alien and subject of the King of Great Britain.

Wherefore your petitioner prays process may issue, requiring the said John McNiel to appear and answer in the premises.

W. W. GORDON, *for Petitioner.*

GEORGIA, *Chatham county:*

Personally appeared Horace Smith, agent of Lowel Holbrook, who being sworn saith that John McNiel is indebted to the said Lowel Holbrook in the sum of five thousand one hundred and forty-three dollars and forty-three cents, on four promissory notes made by the said John McNiel, one dated first September, 1833, payable twenty-four months after date, to the order of William P. Wilson, for fifteen hundred dollars, and by the said William P. Wilson endorsed; another dated 1st September, 1833, payable eighteen months after date to the order of the said William P. Wilson, for fifteen hundred dollars, and endorsed by the said William P. Wilson; another dated 1st October, 1833, payable to the order of Smith, Booth, & Ufford, for thirteen hundred and sixteen dollars twenty-three cents, fifteen months after date, and endorsed by the said Smith, Booth, & Ufford; and the last dated 10th November, 1834, payable ninety days after date, to the order of the said L. Holbrook, as assignee, for eight hundred and eleven dollars twenty cents, and costs of protest. And, further, that he hath reason to apprehend the loss of said sum of money, or some part thereof, to the said Lowel Holbrook, unless the said John McNiel be held to bail.

HORACE SMITH.

Sworn to before me this 21st of January, 1836.

JOS. CUMMING, *J. I. C. C. C.*

Filed 23d January, 1836.

GEO. GLEN, *Clerk.*

UNITED STATES, *District of Georgia:*

The President of the United States to the Marshal of said district, greeting:

Geo. Glen, cl'k, [L. S.] LOWEL HOLBROOK, *vs.* JOHN MCNIEL. } Case.

The defendant, John McNiel, is hereby required to be and appear at the office at Savannah of the clerk of the sixth circuit court of the United States for the district of Georgia, on the first Monday in February next, being the rule day of said court, then and there to answer the plaintiff's demands in an action on the case to his damage ten thousand dollars. In default of such appearance, such proceedings will then and there be had as to justice shall appertain.

Witness the honorable Joseph Story, senior associate justice of the Supreme Court of the United States, this twenty-second day of January, eighteen hundred and thirty-six.

W. W. GORDON, *Plaintiff's Att'y.*

Filed, 23d January, 1836.

GEO. GLEN, *Clerk.*

Received, 23d January, 1836.

A. DRYSDALE, *Deputy Marshal.*

GEORGIA, MARSHAL'S OFFICE,
January 23, 1836.

I have this day arrested the defendant, John McNiel, and taken bond for his appearance, having served him with a copy of this writ.

A. DRYSDALE, *Deputy Marshal.*

$811 20. NEW YORK, *November* 10, 1834.

Ninety days after date I promise to pay to the order of L. Holbrook, assignee, at the United States Branch Bank, Savannah, Geo., eight hundred and eleven dollars twenty cents, value received.

JNO. MCNIEL.

$1,316 23. NEW YORK, *October* 1, 1833.

Fifteen months after date I promise to pay to the order of Messrs. Smith, Booth, & Ufford, at the Bank of State of Georgia, at Savannah, thirteen hundred and sixteen dollars twenty-three cents, value received.

JOHN MCNIEL.

Endorsed, Smith, Booth, & Ufford.

$1,500. SAVANNAH, *September* 1, 1833.

Eighteen months after date I promise to pay to the order of Dr. Wm. P. Wilson fifteen hundred dollars, for value received.

JOHN MCNIEL.

Endorsed, Wm. P. Wilson.

$1,500. SAVANNAH, *September* 1, 1833.

Twenty-four months after date I promise to pay to the order of Dr. Wm. P. Wilson fifteen hundred dollars for value received.

JOHN McNIEL.

Endorsed, Wm. P. Wilson.

Copies of notes filed January 23d, 1836.

GEO. GLEN, *Clerk.*

UNITED STATES, DISTRICT OF GEORGIA, }
Chatham county: }

Know all men by these presents that we, John McNiel and David Leon, are held and firmly bound unto William Maxwell, marshal for the district of Georgia, and to his successors in office, and to his or their assigns, in the penal sum of ten thousand two hundred and eighty-six dollars and eighty-six cents, to be paid to the said William Maxwell, his successors in office, or to his or their assigns, to which payment we bind ourselves, our heirs, executors, and administrators, jointly by these presents, sealed with our seals and dated at Savannah, this twenty-third day of January, eighteen hundred and thirty-six. Whereas the said William Maxwell, marshal as aforesaid, hath this day arrested the said John McNiel, under bail process from the honorable the sixth circuit court of the United States for the district of Georgia, at the suit of Lowel Holbrook: now the condition of this obligation is such, that if the said John McNiel shall well and truly personally appear at the office in Savannah of the clerk of the sixth circuit court of the United States for the district of Georgia, on the first Monday in February next, being the rule day of said court, then and there to answer an action against him in favor of Lowel Holbrook, to his damage ten thousand dollars, and shall further do and abide the judgment or decree of the said court in this behalf, then these presents to be void, else to be and remain in full force and effect.

JOHN McNIEL, [L. S.]
DAVID LEION, [L. S.]

Signed, sealed, and delivered in the presence of
R. RAIFORD, *J. P.*

Personally appeared the within named David Leion, who being sworn, saith that after the payment of all his just debts he is worth double the sum sworn to in the action Lowel Holbrook vs. John McNiel, to wit, double the sum of five thousand one hundred and forty-three dollars and forty-three cents.

DAVID LEION.

Sworn to before me this 23d January, 1836.

R. RAIFORD, *J. P.*

Filed, 23d January, 1836.

GEO. GLEN, *Clerk.*

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JOHN McNIEL, *ads.* LOWEL HOLBROOK, } Case. Sixth circuit court for the district of Georgia.

The said defendant, John McNiel, by William Law, his attorney, comes and defends the wrong and injury when, &c. And for plea, saith that he did not undertake and promise, in manner and form as the said plaintiff has thereof above declared against him, and of this he puts himself upon the country.

WILLIAM LAW, *Deff'ts Att'y.*

And the plaintiff, by his attorney, doth the like.

W. W. GORDON,
Plaintiff's Attorney.

Plea filed 19th February, 1836.

GEO. GLEN, *Clk.*

And thereupon issue was joined between the said Lowel and the said John. And afterwards, on the 11th day of November, 1836, being a day of the term of the said court held at Milledgeville, came the parties aforesaid before the honorable James M. Wayne, presiding judge of the said court, and the aforesaid issue so joined between the parties aforesaid came to be tried by a jury of the said district, for that purpose duly impanneled, that is to say, Charles Rall, William Williams, Joseph K. Chambers, Joshua Covy, William D. Jordan, John C. Maddox, Thomas Palmore, Ezra Dagget, Thomas G. Chambers, Hiram Buckner, James G. Russell, Jr., and John Con, at which day came there as well the said Lowel and John, as also their attorneys aforesaid. And the jurors of the jury aforesaid being called, also came, and were then and there in due manner chosen and sworn to try the same issue, and upon the trial of that issue the counsel learned in the law for the said Lowel, to maintain the said issue, on his part offered the testimony of W. W. Gordon, Esquire, to prove "that John McNiel has repeatedly, and as late as the 1st of November last, admitted his indebtedness upon these four promissory notes, and at that time offered to confess a judgment for the amount of principal and interest, upon certain terms, by which he was to be allowed time for the payment of part. The negotiation continued until the 3d November, instant, and was then only not completed from J. McNiel's inability to pay the cash, which he had in the first instance offered." To the admission of which testimony by the said court the said John, by his counsel aforesaid, did then and there object, and did insist before the said court that the acknowledgment of the said John, which the said witness was offered to prove, was a mere offer to buy his peace by a compromise made in the course of a negotiation for the settlement of the claim of the said Lowel, which said compromise and negotiation having failed, that the said acknowledgment so made could not be given in evidence to sustain the said issue on the part of the said Lowel; but the said court did then and there overrule the said objection to the admission of the testimony of the said W. W. Gordon, who was thereupon admitted and sworn as a witness, and testified to such acknowledgment of the said John.

Whereupon the counsel for the said John did, in his behalf, except to the aforesaid decision of the said court. And upon the trial of the said issue, the counsel learned in the law for the said Lowel, to maintain and prove the said issue on his part, gave in evidence that "J. McNiel has repeatedly, and as late as the 1st November last, admitted his indebtedness upon these four promissory notes, and at that time offered to confess a judgment for the amount of principal and interest upon certain terms, by which he was to be allowed time for the payment of part. The negotiation continued until the 3d November, inst., and was then only not completed from J. McNiel's inability to pay the cash, which he had in the first instance offered." Whereupon the counsel for the said John did then and there insist before the court aforesaid, on the behalf of the said John, that the said several matters so produced and given in evidence on the part of the said Lowel, were not sufficient, nor ought to be admitted or allowed, to entitle the said Lowel to recover against the said John his damages aforesaid, and that the said Lowel having declared as endorsee of a promissory note alleged to have been made by the said John to one Smith, Booth, and Ufford, was bound to prove the endorsement of the said Smith, Booth, and Ufford; and that the said Lowel having also declared as endorsee of two other promissory notes, alleged to have been made by the said John to one William P. Wilson, was bound to prove the endorsement of the said William P. Wilson, to entitle him to recover on the said several promissory notes his damages aforesaid against the said John; and did further pray the said court to instruct the jury that the said several matters so produced and given in evidence by the said Lowel were not sufficient, nor ought to be admitted to prove the indebtedness of the said John to the said Lowel, on the three several promissory notes aforesaid, so declared on by the said Lowel, nor to dispense with the proof of the endorsements of the said Smith, Booth, and Ufford, and of the said William P. Wilson.

And did further pray the court to instruct the jury, that if they believed that the acknowledgment so proved to have been made by the said John to the said W. W. Gordon, was made by himin the course of a negotiation for a compromise with the said Lowel, or his attorney, which had failed, and for the purpose of buying his peace by such compromise, that such acknowledgment was not sufficient to entitle the said Lowel to recover against the said John his damages aforesaid, on the three several promissory notes aforesaid, without proof by the said Lowel of the endorsement of the said Smith, Booth, and Ufford, and of the said William P. Wilson.

And did further pray the court the court to instruct the jury, that the acknowledgment so proved to have been made by the said John to the said W. W. Gordon, was not sufficient to entitle the said Lowel to recover against the said John, without proof by the said Lowel of the endorsements of the said Smith, Booth, & Ufford, and of the said William P. Wilson; which several instructions the said court refused to give; and did then and there declare and deliver to the jury, as the opinion of the said court, that the said several matters, so produced by the said Lowel, were sufficient to entitle the

said Lowel to recover against the said John, his damages aforesaid; and the jury aforesaid, then and there, gave their verdict for the said Lowel, for his damages aforesaid, for the sum of five thousand seven hundred and eighty-seven dollars and twenty-nine cents. Whereupon the counsel for the said John did except to the aforesaid opinion and instructions of the said court, and did pray the said court to seal this bill of exceptions, in pursuance of the statute in such case made and provided, this twenty-third day of November, one thousand eight hundred and thirty-six.

JAMES M. WAYNE, [L. S.]
Associate Justice Supreme Court United States.

THE UNITED STATES OF AMERICA, *District of Georgia.*

The President of the United States of America, to the judges of the sixth circuit court of the United States, for the district of Georgia, greeting:

For as much as in the record and proceedings, and, also, in giving of judgment in a certain plaint which was before you, or some of you, in the said court, between Lowel Holbrook and John McNiel, in a plea of assumpsit, as it is said manifest error hath intervened to the great damage of the said John McNiel as by his complaint it is stated, and it being just and proper that the errors, if any, be duly amended, and that full and speedy justice be done to the parties aforesaid in this behalf, it is hereby commanded you, that if judgment be given thereupon, then that you send under your seals or the seal of one of you, distinctly and openly, the record and proceedings in the plaint aforesaid, with all things touching the same and this writ, so that you have the same before the chief justice and associate justices of the Supreme Court of the United States, on the second Monday in January next, at the city of Washington, being the seat of the National Government, that the records and proceedings aforesaid being inspected, the said justices may cause to be done thereupon for amending the said error, what of right and according to right ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, at Savannah, this twenty-third day of November, in the year of our Lord one thousand eight hundred and thirty-six.

GEORGE GLEN, *Clerk.*

BERRIEN & LAW,
Attorneys for plaintiff in error.

JAMES M. WAYNE,
Associate Justice Sup. Court United States.

LOWEL HOLBROOK, *vs.* JOHN MCNIEL. } Case, Verdict and Judgment.

Afterwards, to wit, on the fourteenth day of November, eighteen hundred and thirty-six, came the said John McNiel by Berrien & Law his attorneys, and says, that in the record and proceedings

aforesaid, and also in giving the judgment aforesaid, before the judges of the circuit court of the United States for the District of Georgia, there is manifest error in this; that the said judges of the said court did then and there admit and allow the testimony of William W. Gordon to be received, and go to the jury, then and there impanneled to try the said cause, for the purpose of proving the endorsements upon the said notes on which the said action was brought, and which testimony was as follows, viz. "That J. McNiel has repeatedly, and as late as the first November last, admitted his indebtedness upon these four promissory notes, and at that time offered to confess a judgment for the amount of principal and interest, upon certain terms, by which he was to be allowed time for the payment of part. The negotiation continued until the 3rd Nov. inst., and was then only not completed from J. McNiel's inability to pay the cash, which he had in the first instance offered." Notwithstanding the said defendant then and there objected to the admissibility of the said testimony.

2. There is also error in this; that the said defendant then and there by his counsel, requested the said judges of the said court to instruct the jury, then and there impanneled to try the said case, that the said evidence was insufficient to establish and prove the endorsements upon said notes, that the effect of the said testimony could only amount to an offer to buy or procure his peace by the defendant; and that the admission by defendant of indebtedness was not an admission of the endorsements; which instruction the said judges then and there refused to give.

There is also error in this; that by the record aforesaid, it appears that in the issue aforesaid judgment was given for the said Lowel Holbrook, the plaintiff, against the said John McNiel, the defendant, whereas by the law of the land judgment ought to have been given for the said John McNiel, the defendant, against the said Lowel Holbrook, the plaintiff. And the said John McNiel prays that, for the errors aforesaid, and other errors manifest on the said record and proceedings, the judgment aforesaid may be reversed, annulled, and held entirely for nothing, that he the said defendant may be restored to all things that he has lost thereby, and that the said Lowel Holbrook may rejoin to these errors, &c.

BERRIEN & LAW,
Attorneys for plaintiff in error.

Let a writ of error and supersedeas issue agreeably to the prayer of the petitioner, upon bond in terms of the statute being filed in the clerk's office for seven thousand dollars.

JAMES M. WAYNE,
Associate Justice Sup. Court United States.

DISTRICT OF GEORGIA.

JOHN MCNIEL, *plaintiff in error*,
vs.
LOWEL HOLBROOK, *defendant in error*. } Writ of Error.

You are hereby cited and admonished to appear to a writ of error

filed in the above cause in behalf of John McNeil, plaintiff in error, which writ and the assignment of errors are filed in the clerk's office of the circuit court of the United States for this district: and you are further cited and admonished to be and appear before the justices of the supreme court of the United States, on the second Monday in January next, at the city of Washington, being the seat of the national government, and then and there to defend the said writ of error. And I do hereby certify that the said John McNeil has given bond and security for the prosecution of the said writ of error to effect.

Dated at Savannah, this twenty-third day of November, in the year of our Lord one thousand eight hundred and thirty-six.

JAMES M. WAYNE,
Associate Justice Sup. Court U. States.

To LOWELL HOLBROOK, *deft. in error.*

Served a copy of the within on William W. Gordon, esq., attorney for Lowell Holbrook, by leaving a copy at his place of residence in the city of Savannah, and also by putting a copy in the post-office at Savannah directed to him at Milledgeville, Georgia, this twenty-third day of November, 1836.

WM. LAW.

Sworn to before me, this 23d November, 1836.

GEO. GLEN.

UNITED STATES OF AMERICA, *District of Georgia*, ss.

I, George Glen, clerk of the circuit court of the United States for the district of Georgia, do hereby certify, that the preceding and annexed writing is a true and perfect transcript of the record and proceedings remaining in said court in the cause therein mentioned, taken from and by me, carefully compared with the originals filed, and being of record in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the said circuit court, this third day of February, in the year of our Lord one thousand eight hundred and thirty-seven.

L. S.

UNITED STATES OF AMERICA, *District of Georgia*, ss.

I, Jeremiah Cuyler, judge of the district court of the United States for the district of Georgia, do hereby certify that George Glen, who signed the within certificate, is, and was at the time of signing the same, the clerk of the district and circuit courts of the United States for the district of Georgia; that full faith and credit ought to be given to his acts and attestations as such; and that his said certificate and authentication of the foregoing transcript is in due form.

In witness whereof, I have hereto set my hand this third day of February, in the year of our Lord 1837.

J. CUYLER, *D. J.*